Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHILLIP ANTHONY CARR,

Petitioner,

—v.—

JOHN ASHCROFT, Attorney General of the United States; MICHAEL J. GARCIA, Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; JAMES JOHNSTON, Field Director of the U.S. Immigration and Customs Enforcement, New Orleans District Office; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF JUSTICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kerry William Bretz
Counsel of Record
Jules E. Coven
BRETZ & COVEN, LLP
305 Broadway, Suite 100
New York, New York 10007
(212) 267-2555

57 pp

QUESTION PRESENTED FOR REVIEW

This case involves issues left open by this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which is whether amendments from 1996 to the Immigration and Nationality Act should be applied retroactively to deny an alien a defense from deportation due to criminal acts he committed prior to the enactment of those laws. This case involves important issues regarding decisions of this Court relating to the retroactive application of civil statutes, and not just immigration law. Petitioner, an alien with lawful permanent resident status, engaged in criminal conduct prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-546 (September 30, 1997). AEDPA § 440(d) placed limitations on the availability of a form of relief from deportation proceedings found in former Immigration Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). IIRIRA completely repealed INA § 212(c). Mr. Carr committed a criminal offense in 1995, but did not plead guilty until after the enactment of AEDPA, but before the enactment of IIRIRA. The Immigration Judge and the Board of Immigration Appeals found that Mr. Carr was barred from applying for 212(c) relief. Mr. Carr filed a *habeas corpus* petition challenging his removal order. Both the district court and the court of appeals upheld his removal order. The question presented is:

Whether the court of appeals erred when it applied AEDPA § 440(d) and IIRIRA § 304(b) retroactively to

hold that the Petitioner, whose deportable criminal conduct occurred prior to the statutes' enactments, but whose guilty plea was entered into after the enactment of AEDPA, but before IIRIRA, is ineligible for a waiver of deportation under INA § 212(c).

PARTIES TO THE PROCEEDINGS

The Petitioner is Phillip Anthony Carr.

The Respondents are John Ashcroft, the Attorney General of the United States; Michael Garcia, the Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; James Johnston, Field Director of the U.S. Immigration and Customs Enforcement, New Orleans District Office; U.S. Immigration and Customs Enforcement; and the U.S. Department of Justice.[1]

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[1] The action below listed the following Respondents: Janet Reno, the former Attorney General of the United States; Kevin D. Rooney, the former Acting Commissioner of the Immigration and Naturalization Service; Lynn Underdown, the Louisiana District Director, Immigration and Naturalization Service; the Immigration and Naturalization Service, and the U.S. Department of Justice. Pursuant to FED. R. APP. P. 43(c)(2), John Ashcroft substituted Janet Reno as the Attorney General, and James Johnston substituted Lynne Underdown as the Louisiana District Director, however, his title is now Field Director of U.S. Immigration and Customs Enforcement. Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296) (January 24, 2003), Michael J. Garcia, Acting Assistant Secretary of U.S. Immigration and Customs Enforcement ("ICE") substituted Kevin D. Rooney, James Johnston replaced Lynne Underdown, however, his title is now the Field Director of the U.S. ICE, and the U.S. ICE substituted for the Immigration and Naturalization Service. U.S. Department of Justice is still a Respondent in this matter.

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PETITION FOR A WRIT OF *CERTIORARI*

Phillip Anthony Carr respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, which dismissed Mr. Carr's appeal (App. 1a)[2] and the order denying his petition for rehearing and hearing *en banc* are not reported (App. 27a). However, the dismissal of the appeal is available on Westlaw. *See Carr v. Reno*, No. 01-2270, 2002 WL 24144 (2d Cir. Jan. 4, 2002). The opinion and order of the district court is not reported. (App. 6a). The decision and order of the Immigration Judge (App. 24a) and Board of Immigration Appeals are unreported (App. 19a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on January 4, 2002. On February 20, 2002, Mr. Carr timely filed a petition for rehearing and rehearing *en banc*. The petition for rehearing and rehearing *en banc* was denied on August 27, 2003.

STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (App. 29a), section 440(d) of Antiterrorism and Effective Death Penalty Act

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2 "App." refers to the appendix attached to this petition.

("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (App. 29a-30a), former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (1997), as amended by AEDPA § 440(d) (repealed) (App. 30a), and section 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996) (App. 30a). This matter does not involve any Constitutional provisions.

STATEMENT OF THE CASE

I. STATUTORY AND CASE LAW BACKGROUND

For decades prior to the immigration law amendments of 1996, lawful permanent resident immigrants charged with committing a crime had a statutory right to seek a waiver of any resulting charge of excludability or deportability under INA § 212(c), provided the immigrant had been lawfully domiciled in the United States for seven years. *See* former INA 212(c), 8 U.S.C. 1182(c) (1994), as added by Immigration and Nationality Act of 1952; *see also Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976) (adopting and applying the *Francis* holding nationwide). The 212(c) waiver was unavailable only for individuals convicted of "aggravated felonies" for which they had served five or more years in prison. *See* former INA § 212(c), 8 U.S.C. 1182(c) (1994).

In 1996, Congress amended the Immigration and Nationality Act twice. First, in AEDPA § 440(d), Congress barred 212(c) waivers for several categories of criminal offenses. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Subsequently, in IIRIRA § 304(b), Congress

repealed 212(c) and replaced it with a form of relief called cancellation of removal that is unavailable for individuals convicted of any aggravated felony, regardless of time served. INA § 240A(a), 8 U.S.C. § 1229b(a) (Supp. V 1999).

In 1998, the Second Circuit held that Congress did not intend for AEDPA § 440(d) to be applied in deportation cases that were pending when AEDPA was enacted. *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom Reno v. Navas*, 526 U.S. 1004 (1999). In September 2000, after finding Congress' intent unclear with respect to the application of AEDPA § 440(d) and IIRIRA § 304(b) to pre-enactment convictions in deportation cases not yet pending on the effective dates of these laws, the Second Circuit applied the traditional presumption against retroactive application of a new civil statute and held that the AEDPA and IIRIRA bars to applying for 212(c) relief do not extend to a lawful permanent resident who pleaded guilty or *nolo contendere* to an otherwise qualifying crime prior to the enactment dates of these laws. *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, *INS v. St. Cyr*, 533 U.S. 289 (2001). The Second Circuit's decision in *St. Cyr* included a brief discussion, not necessary to the holding of that case, suggesting that the AEDPA and IIRIRA bars may otherwise be permissibly applied to pre-enactment conduct. *Id.* at 419. Prior to *St. Cyr*, several district courts within the Second Circuit had concluded that AEDPA and IIRIRA could not be applied retroactively to criminal conduct that had occurred prior to the enactment of those statutes. *See Pottinger v. Reno*, 51 F. Supp.2d 349, 362 (E.D.N.Y. 1999); *Maria v. McElroy*, 68 F.2d 206, 229-230 (E.D.N.Y. 1999); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 365-66 (E.D.N.Y. 2000). On appeal, the Supreme Court upheld the Second Circuit's holding that the AEDPA and IIRIRA bars do not apply to

pre-enactment pleas, but did not address the lower Court's dicta regarding the application of the statutes to pre-enactment conduct. *INS v. St. Cyr*, 533 U.S. 289 (2001).

In this case, the government seeks to apply AEDPA § 440(d) and IIRIRA § 304(b) to deny lawful permanent residents the statutory right to seek 212(c) relief to waive the deportation consequences of offenses committed prior to the effective dates of these laws. While *INS v. St. Cyr* was pending before the Supreme Court, the Second Circuit held in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), that the AEDPA and IIRIRA bars may be applied to individuals whose underlying criminal conduct occurred before the enactment of the 1996 immigration law amendments, but whose convictions occurred post-enactment. *Id.* at 86.

In reaching its holding, the *Domond* Court reasoned that because 212(c) waivers are a form of discretionary relief, their loss "does not impose a new legal consequence on [an alien's] pre-AEDPA criminal conduct." *Id.* at 85-86. However, the Supreme Court held in *St. Cyr* that the loss of a "significant likelihood of receiving § 212(c) relief," even though such relief is discretionary, constitutes a new legal effect that is impermissibly retroactive. 533 U.S. at 321-25. The Supreme Court's holding directly contradicts the rationale of the *Domond* decision.

The Second Circuit's decision in the case at hand was the first case to address the viability of *Domond* after this Court's decision in *St. Cyr*. (App. 3a). The panel in *Carr* issued a summary order, which is not a precedent decision. The next case to address the viability of *Domond* was *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002). This decision vacated a stay of removal issued by Judge Gleeson in *Mohammed v. Reno*, 205 F. Supp.2d 39

(E.D.N.Y. 2002), *stay vacated*, 309 F.3d 95 (2d Cir. 2002). Judge Gleeson followed *Domond*, but called its holding into question and granted a stay of removal to Mr. Mohammed, so that he could appeal his decision. The Second Circuit's decision in *Mohammed* was a decision on whether to maintain the stay. The merits of the case were not fully briefed. The *Mohammed* panel held that "at least for purposes of considering the pending motion to lift the stay, that *Domond* remains binding authority in this Circuit." 309 F.3d at 7. Based upon the language used, the *Mohammed* panel did not intend for its decision to be the final word on this issue. The next case, *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2002), cited *Mohammed* without any mention of *Domond*. *Rankine* involved a completely different issue than the case at hand. *Rankine* involved whether the limitations on § 212(c) relief created by the AEDPA and IIRIRA could be applied retroactively to aliens that were convicted by trial prior to the enactment of AEDPA and IIRIRA. In its analysis that there was no impermissible retroactive application to aliens who went to trial, the *Rankine* Court cited to *Mohammed*. 319 F.3d at 100. As a result of the *Rankine* panel merely citing to *Mohammed*, the panels in *Beharry v. Ashcroft*, 329 F.3d 51, 63 (2d Cir. 2003), and *Hibbert v. Ashcroft*, No. 02-2281, 2003 WL 21466746 (2d Cir. June 20, 2003) have cited to *Rankine* for the proposition that *Domond* remains good law.

II. ADMINISTRATIVE PROCEEDINGS

Petitioner, Phillip Anthony Carr, is a forty-four year old male, native and citizen of Jamaica. He was admitted to the United States as a lawful permanent resident on September 27, 1969, when he was only ten years old. He had permanent resident status for thirty years prior to the issuance of his removal order. Mr. Carr's entire fam-

ily is in the United States. His wife and four children are U.S. citizens, as are his mother and seven siblings.

Mr. Carr has three criminal convictions. On March 29, 1984, Mr. Carr pleaded guilty to criminal possession of marijuana in the fourth degree in violation of N.Y. PENAL LAW § 221.15. He paid a $250 fine. On October 1, 1987, Mr. Carr pleaded guilty to criminal sale of marijuana in the fourth degree in violation of N.Y. PENAL LAW § 221.40. He paid a $300 fine. On May 10, 1996, he pleaded guilty to felony possession of marijuana in violation of article 27, section 286 of the Annotated Maryland Code. The criminal conduct occurred on December 14, 1995. He was sentenced to five years imprisonment, but he served forty months.

III. REMOVAL PROCEEDINGS BEFORE THE IMMIGRATION COURT AND THE BOARD OF IMMIGRATION APPEALS

On June 23, 1998, the Immigration and Naturalization Service (now known as the U.S. Immigration and Customs Enforcement) issued a notice to appear ("NTA"), charging Mr. Carr with deportability for having committed an aggravated felony based on his convictions, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. V 1999), and for having committed a controlled substance violation, INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. V 1999).

On July 22, 1999, the Immigration Judge ("IJ") found Mr. Carr removable from the United States based on his criminal convictions and ordered him removed to Jamaica. (App. 25a). Mr. Carr appealed the IJ's decision to the Board of Immigration Appeals ("Board"). On February 3, 2000, the Board dismissed his appeal, holding that he is statutorily ineligible for relief from deportation pursuant to INA § 212(c), 8 U.S.C. § 1182(c)

(1994) (repealed), in light of 1996 amendments to the INA. (App. 19a).

IV. *HABEAS CORPUS* PETITION

Mr. Carr filed a *habeas corpus* petition pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of New York. The *habeas corpus* petition challenged the retroactive applications of section 440(d) of the AEDPA, and section 304(b) of IIRIRA, to preclude Mr. Carr from 212(c) relief. On May 1, 2001, the district court issued an opinion and order denying the *habeas corpus* petition. (App. 6a). The district court held that it was bound by the Second Circuit's decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001). (App. 14a).

V. APPEAL OF THE DISTRICT COURT'S *HABEAS CORPUS* ORDER

On May 22, 2001, Mr. Carr filed an appeal with the United States Court of Appeals for the Second Circuit. On January 4, 2002, the Second Circuit summarily affirmed the decision of the district court and dismissed Mr. Carr's appeal. (App. 2a).

VI. PETITIONS FOR A REHEARING AND REHEARING *EN BANC*

On February 20, 2002, Mr. Carr filed with the Second Circuit, petitions for a rehearing and rehearing *en banc*. On August 27, 2003, the Second Circuit denied Mr. Carr's petitions. (App. 27a). The instant petition for *certiorari* seeks review of that court of appeals judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *INS v. ST. CYR*, 533 U.S. 289 (2001), HAS OVERRULED THE SECOND CIRCUIT'S DECISION IN *DOMOND v. ASHCROFT*, 244 F.3d 81 (2d Cir. 2001)

The Court should grant the petition for *certiorari* because the decision relied upon by the Second Circuit to deny Mr. Carr's *habeas corpus* petition has been implicitly overturned by this Court's decision in *St. Cyr*. This Court held in *St. Cyr* that despite the discretionary nature of section 212(c), its elimination does have legal consequences, and thus, impermissible retroactive effect. *Id*. The Supreme Court stated, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." *Id*.

By contrast, in *Domond* the Second Circuit held that the limitations on 212(c) relief created by AEDPA § 440(d) do not have retroactive effect because 212(c) relief is discretionary. 244 F.3d at 85-86. Logic dictates that this Court's decision in *St. Cyr* cannot contradict *Domond*, yet not undermine *Domond*. In *Mohammed v. Reno*, United States District Court Judge John Gleeson of the Eastern District of New York recognized that *St. Cyr* conflicts with *Domond* because this Court held that taking away discretionary relief can have a retroactive effect. 205 F. Supp.2d at 44-45. However, in *Mohammed*, the Second Circuit gave the following rationalization as to why *Domond* has not been overturned:

> We think the *Domond* quotation has been taken too literally. The panel was obviously aware that, prior to AEDPA, section 212(c) relief often spared an alien from

> being removed from this country. The panel's statement is properly understood to mean only that an order for deportation was always imposed, even though not always carried out. In any event, the Supreme Court's focus on the shift from possible to certain deportation was explicitly tied to the alien's reliance on the prior availability of discretionary relief in deciding to plead guilty.

309 F.3d at 103.

The reasoning of the *Mohammed* panel is a *post hoc* rationalization. Moreover, the Second Circuit's decision in *Mohammed* is flawed because reliance is not the sole determinative factor in deciding whether a statute has an impermissible retroactive effect.

II. THIS COURT HAS NEVER REQUIRED THAT THERE ONLY BE RELIANCE IN ORDER FOR A STATUTE TO BE IMPERMISSIBLY RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has misinterpreted this Court's decision in *INS v. St. Cyr*. In *INS v. St. Cyr*, this Court stated that, "(a)s we have repeatedly counseled, the judgment whether a particular statute acts retroactively 'should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' " 533 U.S. at 321 (quoting *Martin v. Hadix*, 527 U.S. 343, 57-58 (1999) (in turn quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). But in *Domond* and its progeny, the Second Circuit has read these words as if "fair notice," "reasonable reliance," and "settled expectations" were synonymous. As a result of its misreading of *St. Cyr*, the Second Cir-

cuit is only considering whether there was reliance, in order to find that a statute is impermissibly retroactive under the second tier of the *Landgraf* test. Moreover, the Second Circuit seems to be requiring that there be a *quid pro quo*, as well. *See e.g.*, *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2002) ("If they had pled guilty, petitioners would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial, that gave rise to the reliance interest emphasized by the Supreme Court in *St. Cyr.*"). These are requirements that this Court has never imposed. The *St. Cyr* Court was just observing that there was reliance and a *quid pro quo* present in Mr. St. Cyr's case. The Court did not hold that reliance and a *quid pro quo* were required, in order to show that a statute has an impermissible retroactive effect.

The Second Circuit's requirement of a reliance and a *quid pro quo* would result in a different outcome in *Landgraf*, 511 U.S. 244 (1994) and *Rivers v. Roadway Exp. Inc.*, 511 U.S. 298 (1994). This is because there was no reliance or *quid pro quo* in *Landgraf* and *Rivers*. In both of these cases, this Court held that statutes, which increased civil liability, could not be applied retroactively to pre-enactment conduct. Applying the Second Circuit's logic in *Domond*, it would "border on the absurd" to believe that tortfeasors would refrain from tortious conduct, if they knew their monetary liability would be increased at a later date. In other words, the outcome would be different. *St. Cyr* did not intend to overrule these cases.

III. THE SECOND CIRCUIT FAILED TO RECOGNIZE THAT THIS COURT ROUTINELY UTILIZES ANALYSIS FROM *EX POST FACTO* CASES IN DETERMINING WHETHER A STATUTE IS IMPERMISSIBLY RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has refused to utilize *Ex Post Facto* analysis in *Domond* and its progeny. Because of this, the Second Circuit's retroactivity analysis is different from this Court's analysis. The Second Circuit was correct in *Domond* that the *Ex Post Facto* Clause of the Constitution does not apply to immigration proceedings. 244 F.3d at 87. However, in doing so, the Second Circuit ignored the fact that this Court regularly looks to *Ex Post Facto* cases by analogy when determining the retroactive effect of a civil statute. *See, e.g.*, *Hughes Aircraft v. Ex. Rel. Schumer*, 520 U.S. 939, 948 (1997) (*citing Collins v. Youngblood*, 497 U.S. 37 (1990) and *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)); *Landgraf*, 511 U.S. at 269 n.23 (*citing Miller v. Florida*, 482 U.S. 423 (1987)). In fact, this Court relied upon an *Ex Post Facto* case, *Lindsey v. Washington*, 301 U.S. 397 (1937), in its decision in *INS v. St. Cyr*. 533 U.S. at 325.

The term "fair notice," which is one of the three retroactivity benchmarks mentioned in *St. Cyr*, originated in this Court's *Ex Post Facto* cases. *See, e.g.*, *Lynce v. Mathis*, 519 U.S. 433 (1997) ("this Court has consistently stressed 'lack of *fair notice*' as one of the 'central concerns of the *Ex Post Facto* Clause.' ") (emphasis added) (*quoting Weaver v. Graham*, 450 U.S. 24, 30 (1981)); *accord Carmell v. Texas*, 529 U.S. 513, 566 (2000); *Miller v. Florida*, 482 U.S. 423, 430 (1987). In fact, "fair notice" is the benchmark in the Second Cir-

cuit's *Ex Post Facto* cases. *See e.g.*, *U.S. v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994) ("One of the principal aims of the *Ex Post Facto* clause is to ensure that individuals have *fair notice* of what conduct is criminally proscribed"). (emphasis added); *U.S. v. Minicone*, 960 F.2d 1099, 1111 (2d Cir. 1992) (noting that the purpose of the *Ex Post Facto* clause is both reliance and fair notice). Since this Court's decision in *St. Cyr* considered one of the three benchmarks for determining retroactivity to be "fair notice," this Court was essentially stating that *Ex Post Facto* cases are to be looked at in determining whether a statute is impermissibly retroactive.

This Court's retroactivity analysis in criminal *Ex Post Facto* cases offers the most straight forward and functional approach to determining retroactive effect. It looks at the date of the alleged criminal conduct to analyze whether new laws have retroactive effect. The date of conduct is an appropriate yardstick because it provides a clear and enforceable test that avoids the need for a case by case review of the retroactivity issue.

In addressing whether AEDPA § 440(d) has an impermissible retroactive effect for pre-enactment conduct, the Second Circuit in *St. Cyr* stated it would "border on the absurd to argue that" aliens would not have committed crimes if they knew discretionary relief from deportation would not be available. 229 F.3d at 418. It would not, however, border on the absurd not to apply AEDPA and IIRIRA retroactively under *Ex Post Facto* analysis as employed by this Court. Thus, because the Second Circuit is not properly applying this Court's precedents, the Second Circuit is not deciding its retroactivity cases properly.

IV. THE SECOND CIRCUIT FAILED TO FOLLOW THIS COURT'S HOLDING IN *HUGHES AIRCRAFT v. EX. REL. SCHUMER*, 520 U.S. 939 (1997), THAT THE ELIMINATION OF A DEFENSE IN CIVIL PROCEEDINGS HAS AN IMPERMISSIBLE RETROACTIVE EFFECT

The Court should grant the petition for *certiorari* because the Second Circuit's decision is inconsistent with this Court's decision in *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997). In *Hughes Aircraft Co.*, the Court found retroactive effect when a 1986 amendment was applied to a case submitted prior to the amendment's adoption, causing a private party to lose a defense against private suits for submitting a false claim to the government. Elimination of the defense in question technically did not increase the defendant's liability exposure because the defense had never been available in suits brought by government litigators. The Court stated that "while we acknowledge that the monetary liability faced by [this] defendant is the same whether the action is brought by the Government or a *qui tam* relator, the 1986 amendment eliminates a defense to a *qui tam* suit—prior disclosure to the Government—and therefore changes the substance of the existing cause of action . . . by '*attaching a new disability, in respect to transactions or considerations already past.*' " *Id.* at 948 (*quoting Landgraf*, 511 U.S. at 269) (emphasis added). The new disability is the deprivation of a prior defense.

The application of AEDPA § 440(d) or IIRIRA § 304(b) to a non-citizen who committed a prior criminal offense would have a retroactive effect similar to that in *Hughes Aircraft*. The elimination of the right to apply for section 212(c) relief, like the elimination of the prior government disclosure defense in *Hughes Aircraft*, does

not change the magnitude of the Petitioner's potential liability. It does, however, increase the likelihood that this liability, i.e., deportation, will be imposed, and it does so by eliminating prior available relief.

V. THE SECOND CIRCUIT IGNORED THE PLAIN LANGUAGE OF AEDPA § 440(d), WHICH CLEARLY INDICATES THAT IT DOES NOT APPLY TO PRE-ENACTMENT CONDUCT

The Court should grant the petition for *certiorari* because the Second Circuit has incorrectly interpreted AEDPA § 440(d). The *Domond* Court incorrectly stated without elaboration that it is a conviction that renders an alien ineligible for 212(c). 244 F.3d at 85–86. This goes against the plain language of AEDPA § 440(d), which provides that 212(c) relief is no longer available "to an alien who is deportable by reason of having *committed* any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D) [of the INA], or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i) [of the INA]," (emphasis added). The use of the word "committed" indicates that AEDPA should not be applied retroactively to criminal conduct prior to AEDPA's enactment. The use of the word, "committed," in AEDPA § 440(d) to determine who is ineligible for 212(c) is at total odds with the Second Circuit's statement in *Domond* that a "conviction" determines who is ineligible for 212(c). Since the plain language of AEDPA § 440(d) does not apply to pre-enactment conduct, AEDPA is not a bar to Mr. Carr's eligibility for 212(c) relief. Since Mr. Carr's plea was prior to the enactment of IIRIRA, IIRIRA should not be applied retroactively to Mr. Carr based upon the principles enunciated by this Court in *St. Cyr*.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

Kerry W. Bretz
Counsel of Record
Jules E. Coven
BRETZ & COVEN, LLP
305 Broadway, Suite 100
New York, NY 10007
(212) 267-2555

Attorneys for Petitioner